FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-468

IN THE

Supreme Court of the United States

October Term, 1987

DONALD E. AUSTIN,

Petitioner,

v.

BVA CREDIT CORPORATION,
a/k/a Bank of Virginia,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT

ROBERT F. BROOKS
COUNSEL OF RECORD
JESSICA SANDERS JONES
WILLIAM H. WRIGHT, JR.
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

Counsel for Respondent
BVA Credit Corporation

Of Counsel:
JOHN M. TATUM
Miller, Simpson & Tatum
P.O. Box 1567
Savannah, Georgia 21498
(912) 233-5722

October 21, 1987

QUESTIONS PRESENTED FOR REVIEW

I. Do questions of state law paralleling issues under review in the Court of Appeals, presented without explanation of their federal significance, merit review on writ of certiorari?

II. Did the Court of Appeals correctly affirm an award of attorneys' fees, reasonable by definition under Georgia law and in compliance with the applicable Georgia statute, when petitioner had waived any objection to the award by not raising the issue until his reply brief on appeal?

III. Did the Court of Appeals properly refuse to remand this case for equitable relief when petitioner had refused to restore or offer to restore the benefits of loans he received from respondent?

IV. Did the Court of Appeals correctly affirm partial summary judgment in favor of respondent when petitioner's issues of fact related only to a theory of recovery rendered immaterial by five independent, legally sufficient grounds for summary judgment relied on by the trial court?

V. Did the Court of Appeals properly deny petitioner a new trial, despite his meritless claim that jury instructions pertaining to the calculation of damages were misleading, when the jury had returned a verdict for respondent on the merits?

The first question should be answered negatively, the others affirmatively, and the petition should be denied.

Parties to the Proceeding
(Rule 28.1)

Respondent BVA Credit Corporation a/k/a Bank of Virginia is a wholly owned subsidiary of Signet Banking Corporation, formerly Bank of Virginia Corporation. BVA Credit Corporation is now known as Signet Commercial Credit Corporation. Signet Banking Corporation is also the holding company of related companies listed at Appendix 1.

General Finance Service Corporation is a subsidiary of Signet Commercial Credit Corporation, but has sold its assets to Security Pacific Corporation. Budget Plan Company of Virginia is a subsidiary of General Finance Service Corporation.

Table of Contents

	Page
Questions Presented for Review	i
Parties to the Proceeding (Rule 28.1)	ii
Table of Contents	iii
Table of Authorities	v
I. OPINIONS AND JUDGMENTS BELOW	1
II. JURISDICTION	1
III. STATUTES INVOLVED	2
IV. STATEMENT OF THE CASE	2
A. THE LOANS	3
B. THE TRIAL	4
C. SUMMARY JUDGMENT	5
V. SUMMARY OF ARGUMENT	7
VI. ARGUMENT	9
A. AUSTIN'S PETITION PRESENTS NO FEDERAL ISSUES IMPORTANT ENOUGH TO WARRANT REVIEW	9
1. Austin Presents Only Questions Of State Law And Does Not Explain The Reasons The Petition Should Be Granted	9
2. This Case Is Still On Appeal And No Imperative Public Importance Justifies Deviation From Normal Appellate Practice	11
B. AUSTIN'S FAILURE TO DISPUTE THE TRIAL COURT'S PROPER CALCULATION OF ATTORNEYS' FEES CONSTITUTES WAIVER	11
C. AUSTIN WAS NOT ENTITLED TO EQUITABLE RELIEF BECAUSE HE REFUSED TO PERFORM EQUITABLY	15
D. AUSTIN'S ISSUES OF FACT RELATE ONLY TO A THEORY OF RECOVERY RENDERED IMMATERIAL BY THE TRIAL COURT'S FIVE INDEPENDENT, LEGALLY SUFFICIENT GROUNDS FOR GRANTING BVA PARTIAL SUMMARY JUDGMENT	17

Page

1. Austin Does Not Address The First Three Legally Sufficient And Independent Bases For The Trial Court's Ruling 17
2. Austin Was Under No Legal Duress When He Executed The Loan Agreements 19
3. Austin Ratified The Loan Agreements And Waived Any Claims Of Fraud And Duress 20

E. AUSTIN'S OBJECTION TO HIS OWN JURY CHARGE ON DAMAGES IS NOT A PROPER CHALLENGE TO THE PROCEEDINGS BELOW, IS MOOT, AND LACKS MERIT 21

VII. CONCLUSION 23

APPENDIX A-1

Table Of Authorities

Cases

Page

Adams v. *North Am. Business Brokers, Inc.*, 168 Ga. App. 341, 309 S.E.2d 164 (1983) 18

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986) 17

Big Bend Agri-Services, Inc. v. *Bank of Meigs*, 174 Ga. App. 493, 330 S.E.2d 422 (1985) 21

Bonner v. *Wachovia Mortgage Co.*, 142 Ga. App. 748, 236 S.E.2d 877 (1977) 18

Dolanson Co. v. *Citizens & S. Nat'l Bank*, 242 Ga. 681, 251 S.E.2d 274 (1978) 18

Dwoskin v. *Rollins, Inc.*, 634 F.2d 285 (5th Cir. 1981) 22

Federal Power Comm'n v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976) 11

General Motors Acceptance Corp. v. *Bowen Motors, Inc.*, 167 Ga. App. 463, 306 S.E.2d 675 (1983) 20

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 11

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986) 17

Morgan v. *Citizens & S. Nat'l Bank*, 165 Ga. App. 254, 299 S.E.2d 750 (1983) 21

Motz v. *Landmark First Nat'l Bank of Fort Lauderdale*, 154 Ga. App. 858, 270 S.E.2d 81 (1980) 20

National Distillers and Chem. Corp. v. *Brad's Mach. Prods., Inc.*, 666 F.2d 492 (11th Cir. 1982) 21

National Indep. Theatre Exhibitors, Inc. v. *Charter Fin. Group, Inc.*, 747 F.2d 1396 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985) 22

Redwine v. *Frizzell*, 184 Ga. 230, 190 S.E. 789 (1937) 15

Roberts v. *Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946) 15

Roddy Sturdivant Enters., Inc. v. *National Advertising Co.*, 145 Ga. App. 706, 244 S.E.2d 648 (1978) 13

Page

Ryder Truck Lines, Inc. v. *Goren Equip. Co.*, 576 F. Supp. 1348 (N.D. Ga. 1983) 19

Smith v. *Borg-Warner Corp.*, 626 F.2d 384 (5th Cir. 1980) 22

Tidwell v. *Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981) 19,20

United States v. *Benz*, 740 F.2d 903 (11th Cir. 1984), *cert. denied* 474 U.S. 817 (1985) 14

United States v. *Oakley*, 744 F.2d 1553 (11th Cir. 1984) 14

Wheeler v. *Pioneer Invs., Inc.*, 217 Ga. 367, 122 S.E.2d 518 (1961) 16

Woods v. *Wright*, 163 Ga. App. 124, 292 S.E.2d 545 (1982) 19

Statutes and Rules

Sup. Ct. R. 17 9

Sup. Ct. R. 18 9,11

Sup. Ct. R. 21.1(j) 9,10,11

Eleventh Circuit Local Rule 36-1 12

Fed. R. Civ. P. 56 17

O.C.G.A. §13-1-11 2,12,13,14

O.C.G.A. §13-2-2(1) 18

O.C.G.A. §13-4-60 2,15

Other Authorities

5A C.J.S. *Appeal & Error* §1773(2) (1958) 21

I. OPINIONS AND JUDGMENTS BELOW

This litigation results from the financial failure of two companies, the owner of which had borrowed money in an unsuccessful effort to sustain them. Disgruntled, he sued his banker, saying he was overcharged interest and otherwise defrauded.

The United States District Court for the Southern District of Georgia (the trial court) granted partial summary judgment in favor of BVA Credit Corporation (BVA), the banker. Austin's Motion for Reconsideration of that judgment was denied. Jury trial on Austin's remaining allegations resulted in a verdict in favor of BVA. The trial court entered judgment on that verdict, and Austin appealed to the United States Court of Appeals for the Eleventh Circuit. The appellate court affirmed the trial court's rulings in all respects. The same court denied Austin's Petition for Rehearing and Suggestion for Rehearing En Banc (copies of these orders, judgments, and the jury verdict were attached as Petitioner's Appendix 1-22).

Austin then filed a Motion for Relief from Judgment in the trial court. The trial court denied the Motion. (Its order was attached at Petitioner's Appendix 23.) On September 11, 1987, Austin filed a Notice of Appeal from this order to the Eleventh Circuit. (This Notice is attached at Respondent's Appendix 3.) That appeal is pending. Ten days later, Austin petitioned this Court for writ of certiorari to the Eleventh Circuit's first order.

II. JURISDICTION

The parties are in agreement as to jurisdiction.

III. STATUTES INVOLVED

The Georgia attorneys' fee statute states:

> If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other evidence of indebtedness, and 10 percent of the amount of principal and interest owing thereon in excess of $500.00.

O.C.G.A. §13-1-11(a)(2).

Austin's claim for equitable relief involves another Georgia statute, which provides:

> A contract may be rescinded at the instance of the party defrauded; but, in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore to the other party whatever he has received by virtue of the contract if it is of any value.

O.C.G.A. §13-4-60.

IV. STATEMENT OF THE CASE

Although Austin included a copy of the pertinent order in his Appendix, it should be mentioned that the Court of Appeals for the Eleventh Circuit denied his Petition for Rehearing En Banc. In addition, Austin filed a Motion for Relief from Judgment in the trial court, raising an issue disposed of by the Eleventh Circuit: whether the trial court's award of attorneys' fees pursuant to O.C.G.A. §13-1-11 was erroneous. The trial court properly denied the motion on the ground the Court of Appeals' affirmance of the entire judgment was a man-

date that could not be modified or revised upon a motion for reconsideration. (See Order dated August 21, 1987, attached at Petitioner's Appendix 24.) Austin appealed yet again to the Court of Appeals on September 11, 1987. (See Notice of Appeal, Respondent's Appendix 3.) That appeal is pending.

A. The Loans

Austin secured a $1,500,000 revolving credit loan for Diamond Manufacturing Company (Diamond) from BVA on March 14, 1978. On May 12, 1983, BVA set Diamond's credit at $2,450,000 and lent $550,000 to Rose Marine, Inc. (Rose), and $1,000,000 to Austin personally. Austin guaranteed the loans to Diamond and Rose. These transactions were reflected in fully integrated written loan agreements and guaranties. (R1-5-2 through 4, R2-7-2 through 4)[1] Austin and his companies made interest payments only in 1983, made sporadic interest payments in 1984, and altogether ceased payments in 1985. (R9-76 through 77) In July, 1985, BVA notified Austin that the loans were in default. Austin filed this action and then placed himself and his companies in bankruptcy. (R6-61-4) BVA counterclaimed for the amounts due under the loans. (R1-5)

Austin's Complaint consisted of two factually distinct claims for relief: (1) BVA charged Diamond excessive interest, and (2) BVA breached an oral promise to lend more money to Austin. The trial on the first claim resulted in a jury verdict for BVA. The second claim was disposed of by the trial court's summary judgment ruling in favor of BVA.

---

[1]References are to the record on appeal.

B. The Trial

The claim Austin ultimately took to the jury was that BVA overcharged interest by not computing it according to the terms of the March 14, 1978 original loan agreement. Specifically, Austin argued, BVA breached a provision that Diamond would be charged interest at a rate equal to "three and three-quarters percent over the best...interest rate charged from time to time by Bank of Virginia...to its largest and most creditworthy commercial customers for new unsecured 90-day loans" (the "best rate")[2] by calculating interest based on the prime rate rather than this "best rate."[3] (R9-11 through 13)

As it turned out, BVA used Bank of Virginia's prime rate to calculate the interest charged Diamond because, to the Bank of Virginia, "best rate" and prime rate were synonymous, a fact borne out by the testimony of all four of BVA's witnesses at trial. (R9-77, 78, 191, 206, 217) Although BVA's Roy Brown had a personal dislike for the term "best rate," he recognized that the terms were synonymous. (R-96-106) Indeed, contrary to Austin's assertions, the evidence at the trial demonstrated "best rate" was the definition of prime rate. (R9-190)

Austin also argued at trial and on appeal that he was defrauded because he would not have dealt with BVA had he known that "best rate" and prime rate were

---

[2]In early 1981, Bank of Virginia and BVA notified their customers that the interest to be charged in the future would not be based on the "best rate," but would be determined from the "announced prime rate." (R9-188) Austin accepted the change on March 10, 1981. (R9-40 through 43) Thus, the alleged interest overcharge was limited to the three-year period from March 14, 1978 to March 10, 1981.

[3]Originally, Austin claimed BVA favored certain customers with a lower interest rate than its "best rate." When discovery yielded no evidence that BVA had done so, Austin fastened on BVA's interchangeable use of "best rate" and prime rate as the basis for his allegations of fraud.

synonymous. Presumably Austin took that position because he discovered no loans in which BVA charged an interest rate below its "best rate," as he originally charged, nor any difference between best and prime rate, as he later charged. In any event, that position was undermined when Austin admitted he considered the terms synonymous and used them interchangeably in his own business dealings. (R9-152, 166 through 172)

Although the trial court recognized the paucity of Austin's evidence (R-9-254), the "best rate" claim was submitted to the jury, which returned a verdict for BVA. (R9-277, 278)

C. Summary Judgment

In the early 1980's, escalating disputes between Austin and his sister, Dolores Diamond, threatened the economic viability of Diamond. (R3-30, Exhibits 5-8) Austin alleged that to resolve the disputes, BVA made an oral promise to him in late 1982 to lend him enough money at no additional collateral so that he could purchase his sister's ownership interest in Diamond, pay off trade creditors, and provide operating capital for the company. (R1-1-2) In reliance on this amorphous promise, he agreed to buy his sister's interest in Diamond. Austin further contended BVA conspired with his sister to breach this oral contract and to subject him to economic duress in order to force his acceptance of the written loan agreements.

These allegations stated deficient claims as a matter of law and, thus, the trial court, by Order dated July 2, 1986, granted BVA partial summary judgment. (R6-61)[4] The court based its ruling on five separate and independent legal grounds:

---

[4]The trial court, by Order dated July 24, 1986, denied Austin's Motion for Reconsideration. (R6-68)

1. the alleged oral promise was unenforceable under Georgia law because no amount, interest rate, or term was specified;
2. the alleged oral promise was merged into the subsequent written agreements of May 12, 1983;
3. the parol evidence rule barred evidence of the alleged oral promise;
4. Austin's economic duress and conspiracy allegations, even if true, did not constitute legal duress; and
5. Austin ratified the May 12, 1983 loan agreements and waived any claims of fraud and duress by retaining the proceeds, making interest payments, and executing thirteen separate renewals and extensions of the loans.

These inescapable legal conclusions were supported by dispositive, yet undisputed, facts:

First, though Austin alleged BVA breached its oral promise because it did not lend him enough money and required additional collateral, he admitted that BVA "never made a commitment" to lend him a specific amount of money. (R-3-30, Exhibit 19; see also R3-30, Exhibit 9) In addition, there was no evidence Austin and BVA ever agreed on the duration of the alleged loan or the interest rate. Equally important, Austin testified he knew before closing the transaction precisely how much BVA intended to lend him—an amount less than he later claimed was offered. Indeed, at the loan closing, Austin asked for, but was denied, the additional funds allegedly promised. (R3-30, Exhibit 9) Finally, Austin admitted he knew of and specificially agreed to BVA's collateral requirements. (R3-30, Exhibits 13 and 14)

What is more, Austin executed the loan agreements with full knowledge of their contents. Those documents were integrated instruments which specified that they contained the entire agreement between the parties. (R1-5, Exhibits E §11.2, G §13.2, J and A §13.2) Austin doubtlessly understood what he was signing when he executed the loan agreements and accepted the proceeds of the loans. (R3-30, Exhibit 15)

After he signed the agreements, Austin made interest payments and executed additional documents ratifying the transaction. That is, he personally executed a series of extensions and renewals of his personal loan and signed off on extensions and renewals of Diamond's and Rose's loans on thirteen separate occasions.[5]

For these reasons, the trial court granted partial summary judgment. At the same time, the trial court awarded to BVA attorneys' fees equal to 10% of Austin's principal indebtedness and interest as required by Georgia law. Despite nine opportunities to protest either the amount of the fees or the trial court's application of the Georgia statute, Austin remained silent until he filed his reply brief in the first appeal.

V. SUMMARY OF ARGUMENT

First, the writ should be denied simply because Austin has failed to state why it should be granted, a telling departure from the requirements of Rules 21.1(j) and 17 of the Rules of the United States Supreme Court. More than that, Austin's petition presents questions of state

---

[5]Austin renewed his $1,000,000 note on October 23, 1984, February 6, 1985, and April 30, 1985. Diamond renewed its $2,450,000 note on June 26, 1984, July 30, 1984, October 23, 1984, February 6, 1985, and April 30, 1985. Rose renewed its $550,000 note on June 26, 1984, July 30, 1984, October 23, 1984, February 6, 1985, and April 30, 1985. (R3-30, Exhibit 17, Nos. 4, 7, 10, 13, 16, 22, 25, 28, 34, 37, 40, 43, and 46)

law only and involves no issue of federal significance. Worse, the case is pending on appeal, and in disregard of Rule 18, Austin has failed to identify any issue of such imperative public importance to justify deviation from normal appellate practice.

Second, the writ should be denied because the questions Austin presents lack merit. Austin's assertion that the attorneys' fees award was improper is refuted simply by reference to the statute under which the trial court awarded interest. The loan agreements provided for reasonable attorneys' fees, but did not specify a percentage. O.C.G.A. §13-1-11(a)(2) provides that if a percentage is not specified, a provision for reasonable attorneys' fee shall be construed to mean 10% of the principal and interest due. That is precisely what the trial court awarded. In any event, Austin waived any right to protest the award by failing to raise the issue until he filed his reply brief on appeal in the Eleventh Circuit.

Austin's claim that he was entitled to equitable relief is contrary to familiar equitable principles and Georgia statute O.C.G.A. §13-460. Both require a defrauded party (which, as the jury determined, Austin was not) to restore the benefits of a contract before he can rescind it. This Austin did not do.

Austin's jeremiad that his theories of conspiracy and economic duress presented issues of fact suffers from three fundamental defects. Austin says BVA's breach of an oral contract resulted in economic duress which forced him to execute the loan agreements of May 12, 1983. But Austin's alleged oral contract was (a) void for vagueness, and (b) unenforceable under both the merger doctrine and the parol evidence rule. Second, economic duress is not legal duress in Georgia. Third, Austin ratified the written loan agreements and waived duress. Both ratification and waiver were shown conclusively by

Austin's admissions that he retained and spent the loan proceeds, made interest payments on the loans, and executed renewals and extensions of the loans, all with knowledge of the relevant facts.

Consideration of Austin's objection to the damages charge is unnecessary inasmuch as the jury returned a verdict in favor of BVA. The instructions stated Georgia law, so the issue is entirely one of state law.

VI. ARGUMENT

A. Austin's Petition Presents No Federal Issues Important Enough To Warrant Review.

1. Austin Presents Only Questions Of State Law And Has Not Explained The Reasons The Petition Should Be Granted.

The crucible for any petition for writ of certiorari is whether the case is of such overwhelming federal significance that this Court should grant review. Resolution of that issue is guided generally by the standards set forth in Rules 17 and 18 of the Rules of the Supreme Court of the United States. Rule 21.1(j) requires Austin to amplify the reasons why the writ should be allowed, referring specifically to Rule 17. Austin denies Rule 17 even lip service. This is not surprising because the questions Austin presents for review are questions of Georgia law, containing nothing of significant federal interest.

First, in Question 1, Austin disputes the application by the Eleventh Circuit of its own local rules governing affirmances without opinion and questions that court's review of the trial court's choice of law in a diversity case. Obviously, an appellate court's interpretation of its own rule does not conflict with the decision of any other court of appeals. Nor is there any conflict with a federal

rule or statute, whereby an important question of federal law might arise. Just as clearly, the Court of Appeals' affirmance of the trial court's application of Georgia choice of law principles raises no question of federal law.

Austin's Question 2 requests review of the Court of Appeals' affirmance of the trial court's decision that Austin was not entitled to equitable remedies under Georgia law. This is not an issue of federal law. Austin does not, and cannot, point to any radical departure from the usual course of judicial proceedings.

In Question 3, Austin challenges the affirmance by the Court of Appeals of summary judgment against Austin. Question 4 addresses an alleged conflict in jury instructions. Again, resolution of these issues conflicts with no decision of another court of appeals and presents no important question of federal law.

In summary, Austin's petition raises no substantial issue of federal law. He alleges no radical departure from acceptable procedures by the courts below, and he suggests no conflict with another circuit. Indeed, notwithstanding Rule 21.1(j)'s requirements, Austin has not even hinted at the reasons why these issues merit review. Therefore this Court should deny Austin's Petition for Writ of Certiorari.

2. This Case Is Still On Appeal, And No Imperative Public Importance Justifies Deviation From Normal Appellate Procedure.

BVA sets forth in its statement of the case what Austin neglects to state in his: the attorneys' fees issue is again on appeal to the Court of Appeals.[6] Before this Court should consider an issue not finally resolved below, Austin must demonstrate the issue is of such imperative public importance as to justify both deviation from normal appellate practice and immediate settlement by this Court. *See* Rule 18 of the Rules of the United States Supreme Court.

Notwithstanding Rules 18 or 21.1(j), Austin has made no effort whatsoever to establish the imperative public importance of this case. Neither has he suggested how immediate resolution will benefit himself, the federal system, or the general public. In sum, the attorneys' fees issue is not finally resolved on appeal, and in any event the issue concerns Georgia law, or the application of an Eleventh Circuit administrative local rule. Consequently, question 1 does not require, nor even merit, immediate resolution in this Court. *See, e.g., Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

B. AUSTIN'S FAILURE TO DISPUTE THE TRIAL COURT'S PROPER CALCULATION OF DAMAGES CONSTITUTED WAIVER.

In his first appeal to the Eleventh Circuit, Austin claimed in opening brief that because the loan agree-

---

[6]BVA believes Austin's latest appeal is frivolous. Nonetheless, the issues in that appeal and in Question 1 are intimately related or even identical, and until the Court of Appeals has finally disposed of the matter, a petition for writ of certiorari is premature and should be denied.

ments provided for reasonable attorneys' fees, Georgia law, specifically O.C.G.A. §13-1-11, required evidence of the reasonableness of the fees. Then, in his reply brief, Austin took a new position. He said the trial court erroneously awarded attorneys' fees equal to ten percent of the unpaid principal and interest owed BVA because Virginia law governed and required evidence of the reasonableness of the fees.[7] Yet O.C.G.A. §13-1-11 (a)(2), which the trial court applied, does not require evidence of reasonableness. It says:

> If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first $500.00 of principal and interest owing on such note or other evidence of indebtedness, and 10 percent of the amount of principal and interest owing thereon in excess of $500.00.

Here, the loan documents did not specify a percentage. O.C.G.A. §13-1-11 required the trial court to construe reasonable attorneys' fees to be ten percent of the

---

[7]In an effort to federalize the state law issue presented in Question 1 Austin claims the Court of Appeals' affirmance without opinion of the trial court's award of attorneys' fees to BVA violates Eleventh Circuit Local Rule 36-1. That rule permits the Court of Appeals to affirm without opinion, when an opinion would have no precedential value, in five circumstances. Nowhere does Austin discuss the effect of a violation of this rule, though Austin claims he was prejudiced by its violation. Beyond that, Austin does not explain his failure to raise this issue to the Court of Appeals when he petitioned for rehearing or rehearing en banc. Austin thus denied the Eleventh Circuit, the court best situated to correct any violation of Local Rule 36.1, an opportunity to do so. Given this posture of the case, this Court should not review the Court of Appeals' application of its own rule.

judgment.[8] Accordingly, "it was not error for the court to award attorney fees in the absence of proof of the value of the attorney's services." *Roddy Sturdivant Enters., Inc.* v. *National Advertising Co.*, 145 Ga. App. 706, 244 S.E.2d 648, 649 (1978).

In any event, Austin waived the claim that Virginia law applies. Austin said nothing to indicate he thought Virginia law applied on at least nine earlier occasions when attorneys' fees were at issue:

1. In his interrogatory answer to Southern District of Georgia Local Rule 8.6, requiring plaintiff to identify the applicable law, Austin stated that Georgia common law applied to his breach of contract claim; nowhere did he mention Virginia law (R1-1-1);

2. In BVA's Motion for Summary Judgment on its counterclaim against Austin, BVA appended exhibits embodying its demand for ten percent attorneys' fees under O.C.G.A. §13-1-11; yet in response Austin did not challenge the applicability of the Georgia statute or mention Virginia law (R3-30, 42; R4-48);

3. To supplement his brief in opposition to BVA's Motion for Summary Judgment, Austin filed an extra memorandum in response to BVA's rebuttal memorandum in support of BVA's motion; Austin failed to challenge the applicability of Georgia law or even mention BVA's request for attorneys' fees (R6-54);

---

[8]Although BVA was entitled to an additional 5% on the first $500 of debt, BVA waived the additional $25.

4. At the oral argument of BVA's Motion for Summary Judgment, Austin did not oppose, or even comment about, the applicability of the Georgia statute;

5. When the trial court indicated in pre-trial conference that BVA was entitled to ten percent attorneys' fees, Austin offered no opposition (R8-7);

6. Austin stipulated to the inclusion in a pre-trial order of a sentence stating that BVA had notified Austin and his affiliated companies of BVA's intention to collect ten percent attorneys' fees under O.C.G.A. §13-1-11 (R6-63);

7. In his motion and memorandum for reconsideration of the trial court's grant to BVA of partial summary judgment, Austin challenged neither the applicability of the Georgia statute nor the grant of attorneys' fees, and he said nothing of Virginia law (R6-65);

8. Austin presented, along with BVA, an amended judgment order to the trial court; that order set a judgment amount that included ten percent attorneys' fees (R6-71);

9. Finally, on appeal from that judgment, Austin challenged for the first time the award of attorneys' fees; yet he still did not contend that Virginia law applied.

Not until his reply brief did Austin raise the claim that Virginia law applied. "Arguments raised for the first time in a reply brief are not properly before the reviewing court." *United States* v. *Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984); *United States* v. *Benz*, 740 F.2d 903, 916

(11th Cir. 1984), *cert. denied* 474 U.S. 817 (1985). Because Austin did not preserve this argument, he waived it. Therefore this Court need not, and should not, review the matter further.

C. Austin Was Not Entitled To Equitable Relief Because He Refused To Perform Equitably.

Austin's plea to the offices of equity was rejected by the trial court because Austin neither restored nor offered to restore the benefits of the loan agreements:

> [O]ne who seeks the aid of equity must perform equitably himself. *See* O.C.G.A. §23-1-10 (Michie 1982). In contract terms, this maxim means that one seeking rescission or cancellation of an instrument must first tender to defendant any amounts admittedly due and owed under the contract in dispute. *See, e.g., Brooks* v. *Southern Clays, Inc., 220 Ga. 152, 137 S.E.2d 630 (1964); State Mutual Insurance Co. v. Strickland, 218 Ga. 94, 126 S.E.2d 683 (1962).* This Austin has not done.

R6-68-2.

The Georgia statute (O.C.G.A. §13-4-60) expressly provides that a party seeking to rescind a contract for fraud must restore the status quo and pay for the value of the benefits of the contract. Thus, to perfect his claim for equitable relief, Austin first had to repay the benefits he received from the loans. *Roberts* v. *Southern Ry.*, 73 Ga. App. 759, 38 S.E.2d 48 (1946). Here those benefits were not only principal but also interest due BVA. *Redwine* v. *Frizzell*, 184 Ga. 230, 190 S.E. 789, 793-794 (1937) ("[B]efore a borrower who has executed a deed to secure a debt can have affirmative equitable relief . . . such debtor must pay or tender the creditor the

principal and interest due"). Stated simply Austin wants BVA to provide unrequited benefits, an approach that defeats his claim for rescission. *Wheeler* v. *Pioneer Invs., Inc.*, 217 Ga. 367, 122 S.E.2d 518 (1961).

Austin's plea for more time to liquidate his assets was irrelevant at the time because liquidation was (and still is) being controlled by the Bankruptcy Court. (R7-50, 51) Moreover, Austin's actions belied his excuse that he could not satisfy the loans. He had previously refused to do what he claimed below he would like to do. In the years following the May 12, 1983 loan agreements, Austin refused to sell sufficient assets to make even the interest payments that were due despite the fact that "BVA granted Austin extension after extension to give him time to sell his assets and place Diamond in a profit-making position." (R6-61-4) (See R3-30, Exhibit 23) Similarly, Austin once agreed to sell Rockingham Farms to reduce his indebtedness to BVA, but instead he breached that agreement and engaged in litigation with his sister.[9] Thus, Austin's plea to be allowed to prepay principal through a reasonable liquidation of assets c[illegible] years too late. (R6-66, Exhibits B and C) Despite [illegible] pleas, Austin offered no satisfactory reason why some of his assets were not sold to repay, in whole or in part, his indebtedness. Against that background, the trial court properly refused to grant Austin the benefit of any equitable relief.

---

[9]In connection with the purchase of his sister's interest and the execution of the loan agreements, Austin agreed to sell Rockingham Farms and apply his portion of the proceeds to reduce his indebtedness to BVA. See Trial Exhibit DX-32; R3-30, Exhibit 13, pp. 117-118; R3-30, Exhibit 14, R6-66, Exhibit C.

D. Austin's Issues Of Fact Relate Only To A Theory Of Recovery Rendered Immaterial By The Trial Court's Five Independent, Legally Sufficient Grounds For Granting BVA Partial Summary Judgment.

This Court has emphasized in recent decisions that summary judgment should be granted pursuant to Rule 56 of Federal Rules of Civil Procedure, when there is "no genuine issue of material fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986). BVA was entitled to partial summary judgment notwithstanding Austin's allegations of conspiracy and duress because it made proper showings of the lack of genuine, triable issues of material fact. That is, allegations of conspiracy and duress were immaterial because, even if true, they did not constitute legal duress in Georgia. Furthermore, facts material to the trial court's four other independent bases for granting partial summary judgment were freely admitted by Austin. In short, the disputed facts were immaterial and the material facts were undisputed.

1. Austin Does Not Address The First Three Legally Sufficient and Independent Bases For The Trial Court's Ruling.

Austin's duress and conspiracy allegations were bottomed on his claim that BVA breached an oral promise. Austin alleged that because the disputes with his sister endangered Diamond's existence, BVA orally promised to lend him sufficient funds to purchase his sister's interest in Diamond, pay off trade creditors, and provide Diamond operating capital. In reliance on the purported promise, Austin said, he agreed to purchase his sister's interest in Diamond. Austin further asserted that BVA conspired with his sister to cause him economic duress

which compelled him to accept terms less attractive than those orally promised.

The *sine qua non* for such claims is an enforceable oral contract. That, Austin did not have. Rather, Austin admitted his oral contract did not specify an amount, interest rate, or term, and that he subsequently executed written loan agreements on May 12, 1983, knowing the terms were not what he had been promised. These admissions mandated the trial court's decision that Austin had no cause of action based on the purported oral contract. *Dolanson Co.* v. *Citizens & S. Nat'l Bank*, 242 Ga. 681, 251 S.E.2d 274, 276 (1978); *Bonner* v. *Wachovia Mortgage Co.*, 142 Ga. App. 748, 236 S.E.2d 877, 879 (1977).

Moreover, Austin's contract claim was barred by the doctrine of merger and the parol evidence rule because Austin understood the terms of the May 12, 1983 loan agreements when he executed them. (R6-61-7) *Accord Adams* v. *North Am. Business Brokers, Inc.*, 168 Ga. App. 341, 309 S.E.2d 164 (1983); O.C.G.A. §13-2-2(1). (*See also* R3-30-22 through 30)

The trial court properly applied the same reasons to Austin's fraud count.

> The promissory fraud claim must fail for the same reasons. First a cause of action for fraud cannot be predicated on a promise which is unenforceable at the time it was made. *Clare Development Corp.* v. *First National Bank of Columbus*, 243 Ga. 709, 256 S.E.2d 452 (1979); *Sierra Associates* v. *Continental Illinois National Bank & Trust Co.*, 196 Ga. App. 784, 792, 314 S.E.2d 250 (1984). Since an oral promise to make a loan without any specification of principal, interest and duration is unenforceable, it

> cannot support an action for promissory fraud. *Beasley* v. *Ponder*, [143 Ga. App. 810, 240 S.E.2d 111 (1970)], *supra*, at 810, 240 S.E.2d 111; *Bonner* v. *Wachovia Mortgage Co.*, *supra*, at 750, 236 S.E.2d 877.
>
> Austin's promissory fraud claim is likewise barred by the parol evidence rule and the merger doctrine. *See, e.g., Reuben* v. *First National Bank of Atlanta*, 146 Ga. App. 864, 247 S.E.2d 504 (1978).

(R6-61-7 through 8) Unable to confront the trial court's first three bases for granting BVA partial summary judgment, Austin understandably has ignored them at every stage of the litigation since BVA filed its Motion for Summary Judgment.

2. Austin Was Under No Legal Duress When He Executed the Loan Agreements.

In Georgia, economic duress is not legal duress. *Ryder Truck Lines, Inc.* v. *Goren Equip. Co.*, 576 F. Supp. 1348, 1355 (N.D. Ga. 1983) ("[E]conomic pressure is insufficient to constitute duress in the legal sense"). The *Ryder* court based its holding that "one may not void a contract on the grounds of economic duress" on the "clear holding" of the Georgia Supreme Court in *Tidwell* v. *Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981).

Here, the trial court also relied on *Tidwell* in finding Austin's duress allegations immaterial and insufficient:

> Even assuming *arguendo* that Austin found himself compelled to agree to an ill-advised contract because of extrinsic circumstances, such a scenario does not provide an automatic escape hatch from an otherwise lawful transaction.

(R6-61-11, 12) *See also Woods* v. *Wright*, 163 Ga. App. 124, 292 S.E.2d 545 (1982). As the trial court aptly stated, "[f]or Austin to accept and retain the benefits of the loans, then to plead fraud and duress in an effort to evade his obligation to repay them, violates every cardinal principle of contract law." (R6-68-2)

3. Austin Ratified the Loan Agreements And Waived Any Claims of Fraud and Duress

Although Austin suffered no legal duress, any economic duress he might have felt was removed when he received the loan proceeds. By retaining the proceeds and spending the money to benefit his businesses, Austin ratified the loan agreements and waived any claims of fraud and duress. (R6-61-12) *Tidwell* v. *Critz*, 248 Ga. 201, 282 S.E.2d 104 (1981); *General Motors Acceptance Corp.* v. *Bowen Motors, Inc.*, 167 Ga. App. 463, 306 S.E.2d 675, 680 (1983).

Furthermore, after Austin knew the loans differed from the alleged oral promise, he made interest payments on the loans and executed thirteen extensions and renewals of the loans. In short, "[s]ince Austin was fully aware of the circumstances surrounding the 1983 loan agreements at the time of the renewals, his subsequent actions must be construed as a waiver of his duress claim and a ratification of the contracts." (R6-61-13) *Accord Motz* v. *Landmark First Nat'l Bank of Fort Lauderdale*, 154 Ga. App. 858, 270 S.E.2d 81, 83 (1980).

Predictably, Austin sought to avoid his waiver by arguing that principles of waiver, estoppel, and ratification were irrelevant because BVA perpetrated a fraud which concerned the interest rates that it charged its customers. Austin's argument was groundless because (1) the jury found there was no fraud, and (2) Austin admitted he knew the facts relevant to his claims of fraud

and duress claims when he made interest payments and executed renewals and extensions of the May 12, 1983 loan agreements.

E. Austin's Objection To His Own Jury Charge On Damages Is Not A Proper Challenge To The Proceedings Below, Is Moot, And Lacks Merit.

Since the jury found for BVA, Austin's objection to the trial court's damages charge need not be reviewed.

> When a verdict has been returned in favor of the defendant on liability, errors in the giving of a charge, failure to charge, or denial of requests to charge which go only to the matters of damages or the measure of damages are harmless and afford no ground for reversal. See *Maloy* v. *Dixon*, 127 Ga. App. 151, 152 (Hn. 2), 193 S.E.2d 19. These enumerations are without merit.

Big Bend Agri-Services, Inc. v. *Bank of Meigs*, 174 Ga. App. 493, 330 S.E.2d 422, 426 (1985). *See also Morgan* v. *Citizens & S. Nat'l Bank*, 165 Ga. App. 254, 299 S.E.2d 750, 752 (1983). *Accord National Distillers and Chem. Corp.* v. *Brad's Mach. Prods., Inc.*, 666 F.2d 492, n.3 (11th Cir. 1982). *See* 5A C.J.S. *Appeal & Error* §1773(2), n.74 (1958).

Although the argument is moot, there was no error because the charge did not mislead the jury. *National Distillers*, 666 F.2d at 497. The trial court specifically charged the jury concerning Austin's claim that he was defrauded in that he did not know that "best rate" and prime rate were the same. (R9-266, 267) The trial court went on to explain BVA's position that the terms were synonymous. (R9-268) As a matter of fact, except for the paragraph setting out BVA's position (R9-268) and BVA's one-page damage instruction (R9-271, 272), the

charge was taken verbatim from Austin's requested charge. Since the trial court gave Austin's requested charge and fully explained Austin's contentions before giving BVA's damage instructions, the charge was not erroneous. *See Smith* v. *Borg-Warner Corp.*, 626 F.2d 384, 387-388 (5th Cir. 1980).

In addition, the evidence presented at trial and the arguments of counsel show that the jury was not misled. BVA's counsel devoted his entire cross-examination of Austin to establishing that Austin knew "best rate" and prime rate were synonymous. (R9-160 through 177) Every witness for BVA testified the terms were synonymous. Indeed, except for Diamond's comptroller, who testified as to Austin's damages, every witness testified about the difference, or lack thereof, between best and prime rate, and counsel repeatedly argued the issue. (R9-12, 13, 15, 228, 230, 232, 246; R9-25, 26, 233 through 240, 243) For Austin to assert the jury did not know it was to decide if "best rate" and prime rate were synonymous is extraordinary when that was the primary issue at trial.

Viewed in light of the evidence and arguments of counsel, the entire charge does not raise a "substantial or ineradicable doubt as to whether the jury was properly guided in its deliberations." Accordingly, there was no error. *National Indep. Theatre Exhibitors, Inc.* v. *Charter Fin. Group, Inc.*, 747 F.2d 1396, 1403 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985). *See also Dwoskin* v. *Rollins, Inc.*, 634 F.2d 285, 294 (5th Cir. 1981).

VII. CONCLUSION

Austin has not given any reason the writ should be granted. Though the attorneys' fees award was proper, Austin waived any challenge to the award by his failure to raise the claim before his reply brief on appeal. Austin was not entitled to equitable remedies because he failed to perform equitably. BVA was entitled to partial summary judgment because Austin's claims were legally deficient. Finally, Austin's objection to the jury charges is meritless and moot since the jury verdict was in favor of BVA. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT F. BROOKS
COUNSEL OF RECORD
JESSICA SANDERS JONES
WILLIAM H. WRIGHT, JR.
Hunton & Williams
Post Office Box 1535
Richmond, Virginia 23212

Counsel for Respondent
BVA Credit Corporation

Of Counsel:
JOHN M. TATUM
Miller, Simpson & Tatum
P. O. Box 1567
Savannah, Georgia 31498

Appendix

In addition to *Signet Commercial Credit Corporation* referred to at page ii of this Brief, **SIGNET BANKING CORPORATION** has thirteen other wholly-owned subsidiaries as follows:

1. *Signet Bank/Virginia* has as direct subsidiaries **Signet Bank International** (which owns and controls **Signet Bank (Bahamas), Ltd.,** which has as a direct subsidiary **Second Eleutheran Investment Co., Ltd.**), **800 Building Corporation, Signet Mortgage Corporation,** and **Signet Second Mortgage Corporation,** (which has as a direct subsidiary **Peninsula Development Corporation**);

2. *Signet Trust Company*

3. *Elgin Corporation*

4. *Signet Properties Company*

5. *Signet Insurance Services, Inc.*

6. *Signet Investment Banking Company*

7. *Signet Investment Corporation*

8. *Landmark Financial Services, Inc.*, has as direct subsidiaries **Atlantic-Phoenix Life Insurance Co., Landmark Mortgage Corp. of MD, Landmark Financial Services of MD, Inc., Landmark Financial Services of WV, Inc., Landmark Financial Services of NC, Inc.** (which owns the assets of **Southeastern Finance Corp. of Dunn, NC**), **Landmark Financial Services of SC, Inc., Landmark Financial Services of TN, Inc., Landmark Financial Services of GA, Inc., Landmark Financial Services of FL, Inc., Landmark Financial Services of AL, Inc., Landmark Financial Services of MS, Inc.,** (which owns the assets of **Dacor Finance, Inc.**), **Landmark Mortgage Corporation, Landmark Mortgage Corp. of VA,** and **Landmark Equity Corp. of FL.**

9. *Signet Bank/Maryland* has as direct subsidiaries **Signet Equipment Company, Wharton & Bennett, Inc., St. Paul Realty, Inc., Sect. 12-A Corp., Sect. 12-B Corp., Sect. 13 Corp., Sect. 14 Corp., UTC Prop. No. 1, Inc., UTC Prop. No. 2, Inc., UTC Prop. No. 3, Inc., UTC Prop. No. 4, Inc., UTC Prop. No. 5, Inc., UTC Prop. No. 6, Inc., Landexco, Inc., Mystic Harbour Corp., MH Utilities Corp.** (the last thirteen subsidiaries are corporations holding real and personal property acquired by foreclosure), **Signet Home Loan Corporation** (which owns all the outstanding stock of **Signet Home Loan Corporation/ South Carolina, Signet Home Loan Corporation/Virginia, Signet Home Loan Corporation/North Carolina** and **Signet Home Loan Corporation/Pennsylvania**), **Signet Leasing and Financial Corporation,** and **Preferred Brokerage Service, Inc.**

10. *Signet Realty, Inc.*

11. *Signet Insurance Services, Inc./Maryland*

12. *Signet Bank N.A.*

13. *Signet Bank (Grand Cayman), Ltd.*

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

DONALD E. AUSTIN,
Plaintiff,

vs.

BVA CREDIT CORPORATION, a/k/a BANK OF VIRGINIA,
Defendant.

CIVIL ACTION NO. CV485-373

(Filed 9/11/86)

NOTICE OF APPEAL

Notice is hereby given that DONALD E. AUSTIN, Plaintiff in the above referenced matter, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order entered in the above-captioned action on August 21, 1987.

THIS 11th day of SEPTEMBER, 1987.

BOUHAN, WILLIAMS & LEVY

/s/ Walter C. Hartridge

/s/ M. Tyus Butler, Jr.

/s/ Roy E. Paul

ATTORNEYS FOR PLAINTIFF

Post Office Box 2139
Savannah, Georgia 31498-1001
(912) 236-2491